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CLIMATE TORT FEDERALISM

Tracy Hester*

INTRODUCTION

After a brief hiatus, the climate litigation wars have flared back to life in a new arena: the broad and unruly panoply of state tort law. This renewed fighting breaks the uneasy armistice that had emerged in 2011 when the U.S. Supreme Court, in *American Electric Power Co. v. Connecticut*, foreclosed federal common law public nuisance torts for climate change damages by ruling that the federal Clean Air Act displaced those claims.[1] That lull ended abruptly in 2017 and 2018 when a battalion of local governments in California, New York, Colorado, Washington State, and Rhode Island brought new tort lawsuits under their respective state laws against energy producers in both state and federal courts.[2] These actions squarely raise the

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1 564 U.S. 410 (2011).

2 Complaint, County of San Mateo v. Chevron Corp., No. 17-CIV-03222 (Cal. Super. Ct. July 17, 2017) [hereinafter San Mateo Complaint]; Complaint, Marin County v. Chevron Corp., No. 17-CIV-02586 (Cal. Super. Ct. July 17, 2017) [hereinafter Marin Complaint]; Complaint, City of Imperial Beach v. Chevron Corp., No. C17-01227 (Cal. Super. Ct. July 17, 2017) [hereinafter Imperial Beach Complaint]; Complaint, State v. BP P.L.C., No. CGC-17-561370 (Cal. Super. Ct. Sept. 19, 2017) [hereinafter Oakland Complaint]; Complaint, City of Richmond v. Chevron Corp., No. C18-00055 (Cal. Super. Ct. Jan. 22, 2018); Complaint, City of New York v. BP P.L.C., No. 18-cv-182 (S.D.N.Y Jan. 9, 2018) [hereinafter New York City Complaint]; Complaint, Bd. of Cty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.), Inc., No. 18-cv-030349 (Colo. Dist. Ct. Apr. 17, 2018) [hereinafter Boulder Complaint]; Complaint, King County v. BP P.L.C., No. 18-2-11859-0 (Wash. Super. Ct. May 9, 2018) [hereinafter Seattle Complaint].

challenge of how to manage the possibility of multiple state and federal court tort actions under varying state laws against corporations, governments, and individuals for their roles in contributing to climate change damages.

So far, the California tort actions have taken two different approaches. The first group—filed by San Mateo County, Marin County, and the City of Imperial Beach—alleges a broad array of classical state law tort actions such as public nuisance, private nuisance, negligence, trespass, and failure to warn.[3] In addition, the governments also assert strict liability claims for failure to warn and design defects.[4] Their lawsuits target a broad array of thirty-seven large fossil fuel companies, mining corporations, energy trading companies, and up to 100 "John Doe" corporate entities.[5] The complaints seek unspecified compensatory damages, equitable relief to abate nuisances, disgorgement of profits, punitive damages, and reasonable attorney's fees.[6]

By contrast, most of the remaining plaintiffs—the cities of San Francisco, Oakland, and the county governments encompassing Boulder, Colorado and Seattle, Washington—have brought in their respective state courts, a narrower set of public nuisance and other tort claims against a comparatively small group of fossil fuel energy companies.[7] For example, rather than seeking broad and unspecified compensatory and punitive damages, San Francisco's complaint requests the creation of an abatement fund to help take needed steps, like construction of a dike wall to deal with anticipated climate change effects such as rising sea levels and enhanced storm severity.[8]

In addition to local governments in California, Colorado, and Washington state, the City of New York has filed its own climate tort action under common law theories of recovery. Rather than use its state's courts, however, the City of New York brought its action in the Southern District of New York under federal diversity jurisdiction.[9] Its complaint carefully targets

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3 San Mateo Complaint, *supra* note 2, ¶¶ 78–98 (eight counts alleging public nuisance, strict liability, failure to warn, private nuisance, negligence, and trespass); Marin Complaint, *supra* note 2, ¶¶ 79–87 (same); Imperial Beach Complaint, *supra* note 2, ¶¶ 75–95 (same).

4 San Mateo Complaint, *supra* note 2, ¶¶ 78–98 (eight counts alleging public nuisance, strict liability, failure to warn, private nuisance, negligence, and trespass); Marin Complaint, *supra* note 2, ¶¶ 79–87 (same); Imperial Beach Complaint, *supra* note 2, ¶¶ 75–95 (same).

5 San Mateo Complaint, *supra* note 2, ¶¶ 6–22; Marin Complaint, *supra* note 2, ¶¶ 6–23; Imperial Beach Complaint, *supra* note 2, ¶¶ 5–22.

6 San Mateo Complaint, *supra* note 2, ¶¶ 98–99; Marin Complaint, *supra* note 2, ¶¶ 99–100; Imperial Beach Complaint, *supra* note 2, ¶¶ 95–96.

7 For example, the King County complaint lists BP P.L.C., Chevron Corp., ConocoPhilips, Exxon Mobil Corp., and Royal Dutch Shell P.L.C. Seattle Complaint, *supra* note 2, ¶¶ 1, 4–8. The complaint also leaves room for up to 10 Doe defendants. *Id.*

8 Oakland Complaint, *supra* note 2, ¶ 39.

9 New York City Complaint, *supra* note 2, ¶¶ 13–14 (asserting diversity jurisdiction).

only five energy corporate defendants in a way that preserves the parties' complete diversity,[10] and specifically eschews any claims for damages arising from federal land that might create a federal question. The City has demanded monetary compensation for its damages and requested a jury trial.

The most recent lawsuit has arisen in Rhode Island, where the state has brought a state law tort action in its Superior Court against 21 named energy companies and up to 100 John Doe defendants.[11] The lawsuit alleges, like the other state actions, that the companies knew that their products contributed to climate change, but they continued to sell them through misrepresentations and false statements.[12] The state raises several state tort causes of action, including public nuisance, negligent failure to warn, negligent design defect, trespass, and strict liability failure to warn and design defect.[13] In addition, Rhode Island also contends that the companies' actions impaired the state's public trust resources and violated its state Environmental Rights Act.[14] The complaint seeks equitable relief (including abatement of the nuisance), compensatory damages, punitive damages, and disgorgement of profits,[15] and it also requests the costs of the suit itself.[16] This action, for the first time, involves an action by an attorney general on behalf of the state government itself rather than a local county or municipal government.[17]

While all of these cases remain at the earliest stages of motion practice and dispositive motions, they have already generated a flurry of notable tactical maneuvers, precedent-setting innovations in case management, and

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10 The complaint targets BP P.L.C, Chevron Corporation, ConocoPhillips, Exxon Mobil Corporation, and Royal Dutch Shell PLC. *Id.* ¶¶ 16–23. It specifically contends that the defendants are citizens of California, New Jersey, Texas, Delaware, England, and the Netherlands. *Id.* ¶ 31.

11 Complaint, Rhode Island v. Chevron Corp., No. PC-2018-4716 (R.I. Super. Ct. Providence Cty. July 2, 2018) [hereinafter Rhode Island Complaint].

12 *Id.* ¶¶ 106–224.

13 *Id.* ¶¶ 225–93.

14 *Id.* ¶¶ 294–314.

15 *Id.* ¶ 315.

16 *Id.* The request for costs could prove especially important because Rhode Island retained outside counsel to serve as co-counsel with the Attorney General. The use of outside counsel, especially on a contingency fee basis, has proven enormously controversial in natural resource damages litigation brought by state agency trustees. Julie E. Steiner, *The Illegality of Contingency Fee Arrangements When Prosecuting Public Natural Resource Damage Claims and the Need for Legislative Reform*, 32 WM. & MARY ENVTL. L. & POL'Y REV. 169 (2007).

17 As this article was going to press, the City of Baltimore filed its own climate tort lawsuit against 26 energy corporations on July 20, 2018. *See* Complaint with Request for Jury Trial, Mayor & City Council of Baltimore v. BP P.L.C., No. 24C18004219 (Md. Cir. Ct. Balt. City July 20, 2018). Like many of the prior actions by other local governments, the city's complaint alleges that the defendants made false statements on climate science and fuel emissions, and it asserts counts of private nuisance, public nuisance, trespass, strict liability failure to warn, negligent failure to warn, strict liability design defect, negligent design defect, and the state's Consumer Protection Act. *Id.* ¶¶ 107–30.

important substantive rulings. All of the California court cases and the Washington action have already seen motions to remove them to federal court on differing grounds,[18] and some of the plaintiffs have responded by either dismissing problematic defendants[19] or vigorously opposing the grounds for removal and dismissal posed by bankrupt defendants.[20] The fast pace and varying fora have, unsurprisingly, already generated conflicting rulings: one judge has found that federal common law controlled the local government's tort claims as they relate to the defendants' marketing and sales of petroleum products,[21] moved ahead with substantive briefing (including an innovative "climate science tutorial"),[22] and then decided to defer to the legislative and executive branches by dismissing the complaints.[23] The Southern District of New York reached a similar conclusion and also dismissed the action before it,[24] and the City of New York had already announced its intent to appeal the ruling.[25] By contrast, the San Mateo County court ruled that federal common law does not control the lawsuit, and instead remanded the removed case back to the California trial court.[26] The decisions in both cases will likely end up in a quick appeal to the Ninth Circuit. Given

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18 *See, e.g.*, Notice of Removal, King County v. BP P.L.C., No. 18-CV-00758-RSL (W.D. Wash. May 9, 2018). As of the date of this article, the defendants in the Colorado and Rhode Island state court actions have not sought to remove the cases to federal court.

19 The City of San Mateo voluntarily dismissed without prejudice Statoil USA (an agency of the state of Norway) from its original complaint on July 17, 2017. Chevron Corporation and Chevron U.S.A. Inc. subsequently brought a third-party complaint against Statoil on December 15, 2017. Third-Party Complaint of Defendants Chevron Corporation and Chevron U.S.A. Inc. for Indemnity and Contribution Against Third-Party Defendant Statoil USA, County of San Mateo v. Chevron Corp., No. 17-CV-4929-VC (N.D. Cal. Dec. 15, 2017). The renewed presence of Statoil, as a unit of a foreign sovereign entity arguably entitled to sovereign immunity defenses, will likely bolster Chevron's attempts retain the lawsuit in federal court.

20 The Eastern District of Missouri bankruptcy court enforced the discharge and injunction provisions of Peabody Energy's Chapter 11 bankruptcy plan by enjoining San Mateo, Imperial Beach, and Marin Counties from pursuing their tort action against the companies. In re Peabody Energy Corp., No. 16-42529-399, 2017 Bankr. LEXIS 3691 (Bankr. E.D. Mo. Oct. 24, 2017).

21 Order Denying Motions to Remand at 5–8, California v. BP P.L.C., No. 17-CV-06012 (N.D. Cal. Feb. 27, 2018) [hereinafter Oakland, Denying Motion to Remand].

22 Notice re Tutorial at 1–2, California v. BP P.L.C., No. 17-CV-06012 (N.D. Cal. Feb. 27, 2018).

23 Order Granting Motion to Dismiss Amended Complaints, California v. BP P.L.C., No. 17-CV-06011-WHA (N.D. Cal. June 25, 2018).

24 Opinion and Order, City of New York v. BP P.L.C., No. 18-CV-00182-JFK (S.D.N.Y. July 19, 2018).

25 Brendon Pierson, *Oil Majors Win Dismissal of New York City Climate Lawsuit*, REUTERS (July 19, 2018), https://www.reuters.com/article/new-york-climatechange-lawsuit/oil-majors-win-dismissal-of-new-york-city-climate-lawsuit-idUSL1N1UF1YC.

26 Order Granting Motions to Remand at 1–3, County of San Mateo v. Chevron Corp., No. 17-CIV-03222 (Cal. Super. Ct. Mar. 16, 2018) [hereinafter San Mateo, Order Granting Motion to Remand]. Judge Chhabria stayed the remand order for 42 days while Judge Alford's conflicting ruling in the *Oakland* trial underwent expedited appeal to the Ninth Circuit. *Id.*

the quick proliferation of venue and jurisdictional challenges, a litigative maelstrom looms ahead.

This essay explores how judicial federalism principles can help organize and structure these emerging state law climate tort initiatives. Rather than add to the debate on whether courts are institutionally suited to hear these claims in the first place, or whether federal or state courts would offer the better venue, this analysis instead simply assumes that these state law actions are coming. If so, we could soon face a situation where multiple state and federal courts will host sprawling and conflicting state law climate liability tort claims involving overlapping plaintiffs and defendants. What principles offer the best path to structure and manage such an overwhelming litigative scrum?

Judicial federalism concepts could provide some of the guidance needed to structure and coordinate litigation in multiple fora at different levels of federal and state government. While most prior academic analysis has centered on how federalism allocates power between state and federal legislatures or agencies, similar concerns regarding preemption, displacement, and coordination will shape the complementary roles of federal and state courts in these lawsuits. The differing and idiosyncratic ways that state courts handle climate torts will reflect fundamental policy choices and principles built into the U.S. Constitution, federal and state judicial and environmental statutes, and long-standing fundamental precedents and judicial practices on civil procedure.

This essay begins with a brisk look at the fate of prior federal common law climate tort actions, and sketches out the basic tenets and prior analyses of judicial federalism and its role in mass-party litigation. It then closely examines how climate tort claims under state law will pose fundamental challenges to the existing allocation of powers and responsibilities between federal and state courts, especially when federal courts host actions controlled by state law and when state courts hear claims involving extraterritorial impacts and the exercise of judicial authority over non-resident parties. Finally, after reviewing several instances where uncontroversial judicial notions of substantive jurisdiction and procedural rules yield troublesome results when applied to state law climate torts, it concludes with suggestions on how to use federalism principles to resolve some of these difficulties and better harmonize state law climate torts with the requirements of judicial federalism.

I. REVIVAL OF CLIMATE TORTS IN NEW FORA

The resurgence of climate tort litigation may seem puzzling given the ignominious fate of earlier federal climate tort lawsuits. In a highly

publicized trio of cases—*American Electric Power Co. v. Connecticut*,[27] *Comer v. Murphy Oil Co.*,[28] and *Village of Kivalina v. Exxon*[29]—plaintiffs brought a variety of federal common law tort claims to recover damages or seek injunctive relief from large numbers of corporate defendants who had allegedly contributed to global greenhouse gas emissions. Those cases have received extensive discussion elsewhere,[30] and each lawsuit offered very different plaintiffs, alleged injuries, actions by defendants, and requested relief. For example, while *Comer* sought to bring a class action tort claim for monetary compensation for damages caused when Hurricane Katrina was allegedly exacerbated by anthropogenic climate change, *American Electric Power Co.* featured public nuisance claims by state and local governments seeking an injunction to force reductions in emissions of greenhouse gases from the defendant's fossil-fueled power plants.[31]

Their differences, however, ultimately mattered far less than their key similarities. First, the district courts in all three cases originally dismissed the tort actions on a variety of grounds before reaching the merits. In two of those cases—*American Electric Power Co.* and *Comer*—their respective appellate courts reversed the trial judges' dismissals and remanded the cases for substantive proceedings. In doing so, both the Fifth Circuit and the Second Circuit initially held that the claims did not pose a non-justiciable political question, met Article III standing requirements, and posed facially valid theories for tort recovery.[32]

Second, and more important, all three cases ultimately ran aground in the U.S. Supreme Court. After granting *certiorari* to review the Second Circuit's ruling in *Connecticut v. American Electric Power Co.*, the Court unanimously found that the federal Clean Air Act had displaced any potential federal common law climate tort claims that might have existed previously.[33] According to Justice Ginsburg's majority opinion, the displacement occurred when Congress gave EPA the power to regulate greenhouse gas emissions

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27 564 U.S. 410 (2011).

28 585 F.3d 208 (5th Cir. Oct. 16, 2009), *revised* Oct. 22, 2009, *vacated by order granting en banc review,* 598 F.3d 208 (5th Cir. 2010), *appeal dismissed for lack of quorum,* 607 F.3d 1049 (5th Cir. 2010).

29 696 F.3d 849 (9th Cir. 2012).

30 A literature search on the *American Electric Power Co.* decision alone, for example, yielded over 1,900 law review articles discussing the decision on the HeinOnline database.

31 *Compare Am. Elec. Power Co.*, 564 U.S. at 415–19 *with Comer*, 585 F.3d at 859–60.

32 *See* Connecticut v. Am. Elec. Power Co., 582 F.3d 309 (2d Cir. 2009); *Comer*, 585 F.3d at 859.

33 *Am. Elec. Power Co.*, 564 U.S. at 415. Notably, the Court split evenly on the narrower question of whether the state governments had standing to bring their public nuisance tort actions at all. *Id.* at 419–20. Justice Sotomayor, after participating in the oral argument on the case before the Second Circuit before her elevation to the Supreme Court, recused herself from the Court's decision.

under the Clean Air Act-–even if EPA chose not to exercise that power.[34] The Court's prior landmark ruling that the Clean Air Act unambiguously classified carbon dioxide as a "pollutant" subject to regulation under the Clean Air Act (as well as imposing a duty on EPA to determine whether greenhouse gas emissions posed an endangerment to human health or the environment)[35] cemented *American Electric Power Co.*'s conclusion that Congress had displaced any possibilities of federal common law tort liability for those same emissions.[36]

The *American Electric Power Co.* ruling effectively brought down the curtain on further federal common law climate tort actions. On remand, the Second Circuit and the *Comer* district court each dismissed the tort actions with prejudice based on the *American Electric Power Co.* opinion's rationale.[37] The Ninth Circuit, which had abeyed its consideration of the *Kivalina* trial court's dismissal ruling, joined its brethren shortly afterward and upheld the trial court's dismissal.[38] While each of these actions also alleged state law tort actions under the district courts' supplemental jurisdiction,[39] the federal courts in all three cases dismissed the corollary actions once the primary federal common law tort actions collapsed. Federal and state common law actions have continued under other theories—namely, multiple lawsuits seeking to hold federal and state governments accountable for their failures to control greenhouse gas emissions under the public trust doctrine[40]—but the use of common law tort actions to seek climate damages had almost completely faded from legal actions in U.S. federal courts.

So why renew the wars? The new lawsuits reflect a conscious strategic choice to revive climate actions by using aspects of state court systems that fundamentally differ from the federal judicial fora and laws. Most importantly, the switch to state law claims within a state court system (or a federal court's diversity jurisdiction) potentially sidesteps the most

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34 *Id.* at 423.

35 Massachusetts v. EPA, 549 U.S. 497, 528–29 (2007).

36 *Am. Elec. Power Co.*, 564 U.S. at 426–29.

37 As noted earlier, a panel of the Fifth Circuit initially issued an opinion that concluded the district court had both subject matter jurisdiction and competence to hear the tort claims raised by the class action defendants. That decision, however, was vacated when the full Fifth Circuit voted to rehear the case *en banc.* When subsequent recusals by the judges deprived the court of a quorum, the Fifth Circuit lost its capacity to hear the appeal. The U.S. Supreme Court subsequently refused to hear an appeal of the case brought via a writ for mandamus. *See supra* note *28*.

38 Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849 (9th Cir. 2012).

39 Tracy D. Hester, *A New Front Blowing In: State Law and the Future of Climate Change Public Nuisance Litigation*, 31 STAN. ENVTL. L.J. 49, 77 n.103 (2012) (plaintiffs invoked the federal district court's supplemental jurisdiction to hear related state law claims in all three cases).

40 Michael C. Blumm & Mary C. Wood, *"No Ordinary Lawsuit": Climate Change, Due Process, and the Public Trust Doctrine*, 67 AM. U.L. REV. 1 (2017).

troublesome barriers that bedeviled federal common law tort climate claims: displacement defenses, standing challenges, political question limitations on judicial competence, and barriers to admissibility of expert testimony and evidence under the Federal Rules of Evidence.[41] Because state courts generally operate as courts of general jurisdiction, they avoid the deeply rooted limits woven into federal judicial powers as courts of limited jurisdiction subject to separation of powers constraints and Article III textual limitations.[42]

Despite this fundamental difference in approach and fora, a re-enactment mentality has already set in. Virtually all of the initial public media coverage and scholarly comments pointed out the unhappy history of the federal common law tort claims and the likely parallel challenges that would arise against the California actions.[43] The most generous initial assessments, in fact, acknowledged the differences between the first California lawsuits and the prior trio of federal climate tort actions, but nonetheless pointed out the significant hurdles and barriers that the California lawsuits will face.[44] Given the ongoing battles over removal, bankruptcy bars, preemption, displacement, standing, justiciability, equitable defenses, and other numerous procedural and jurisdictional challenges that the defendants will likely raise, these difficulties are as daunting as promised.

Rather than revisit these jurisdictional and procedural skirmishes, this essay instead takes seriously the possible need to manage and administer state climate tort lawsuits. In particular, it assumes that some of the current crop of California, Colorado, Washington, Rhode Island, and New York climate tort actions will successfully navigate the threshold challenges raised against them, and that they will then proceed into full-fledged substantive discovery and summary judgment duels. In this scenario, a large and varying cohort of entities that contributed to recent or historical greenhouse gas emissions may face a host of state law tort suits before multiple fora and varying state civil procedures. This variety, however, contrasts with the most unique features of climate tort claims—namely, these lawsuits allege tortious actions that have effects on a global scale even if the acts themselves of emitting greenhouse

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41 *See* Hester, *supra* note 39, at 55–67.

42 *Id.* at 73.

43 *See, e.g.*, Daniel Fisher, *Chevron Says Climate Change Lawsuit 'Not Viable' As It Prepares to Educate Judge on Science*, FORBES (Mar. 21, 2018), https://www.forbes.com/sites/legalnewsline/2018/03/21/chevron-says-climate-change-lawsuit-not-viable-as -it-prepares-to-tutor-judge-on-the-science/#a8a141edcd478; John Schwartz, *Climate Lawsuits, Once Limited to the Coasts, Jump Inland*, N.Y. TIMES (Apr. 18, 2018), http://www.nytimes.com/2018/04/18/climate/exxon-climate-lawsuit-colorado.html.

44 *See, e.g.*, Daniel Fisher, *Climate Lawyers Hope "Public Nuisance" Strategy Reverses Years of Failure*, FORBES (Feb. 12, 2018), https://www.forbes.com/sites/legalnewsline/2018/02/12/climate-lawyers-hope-public-nuisance-strategy-reverses-years-of-failure/#25449c8670f8.

gases are indistinguishable among a vast host of sources at the local level. The location of emissions that give rise to state court jurisdiction, from that perspective, seems almost accidental.

Before exploring the potential challenges posed by full-throated climate state tort litigation, at least one substantive threshold challenge needs close examination because it may affect the ultimate disposition of all the state tort actions. The most immediate and weighty challenge to state tort law climate actions will likely center on preemption challenges. More specifically, defendants will almost certainly shift some of their prior displacement challenges in the federal common law tort actions to a more rigorous preemption attack by alleging that the federal Clean Air Act substantively preempts state law tort actions that impose liability for federally permitted emissions or set out equitable restrictions on federally authorized releases.

To some extent, the U.S. Supreme Court has already outlined the principles of preemption for cross-border state environmental tort claims in its seminal decision in *International Paper Co. v. Oulette*.[45] When faced with a claim that the federal Clean Water Act[46] preempted a nuisance tort claim brought in a Vermont state court for damages incurred in Vermont caused by a discharge in New York, the Court ruled that the Clean Water Act only allowed state tort nuisance actions in the courts of the state which issued the Clean Water Act permit that governed the discharge.[47] This approach, the Court reasoned, would protect dischargers from multiple lawsuits in differing fora to recover damages from discharges permitted by a different state.[48] It also consolidated responsibility on the discharger's state to assure that its permits protected the environment and the public against damaging releases.[49] Despite this guidance from *Outlette*, however, a circuit split has developed on whether the federal Clean Air Act preempts state law tort actions over emissions from permitted facilities.[50]

Extending *Oulette*'s rationale to preempt state law climate tort actions against interstate point sources of greenhouse gas emissions creates significant problems. First, and most importantly, as *Oulette* demonstrates,

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45 479 U.S. 481 (1987).

46 The federal Clean Water Act contains clauses to preserve state law claims that parallel similar provisions in the Clean Air Act. 33 U.S.C.A. § 1370 (West 2017). In fact, Congress essentially adopted the Clean Water Act's preemption and state law preservation provisions when it subsequently adopted the federal Clean Air Act. 42 U.S.C.A. § 7604(e) (West 2017).

47 *Oulette*, 479 U.S. at 498–500.

48 *Id.* at 496–97.

49 *Id.* at 492–500.

50 *Compare* N.C. ex rel. Cooper v. Tenn. Valley Auth., 615 F.3d 291 (4th Cir. 2010) (cross-border air emission tort claims preempted) *with* Merrick v. Diageo Ams. Supply, Inc., 805 F.3d 685 (6th Cir. 2015) *and* Bell v. Cheswick Generating Station, 734 F.3d 188 (3d Cir. 2013).

the threshold for preemption of state common law claims is significantly higher than the burdens to show displacement of federal common law tort actions. The former task evokes significant federalism concerns and risks a damaging intrusion into areas traditionally reserved for state regulatory authority. Second, the potential for preemption based on a direct conflict between federal Clean Air Act permit authorizations and state tort law actions has receded in light of EPA's retreat from requiring facilities that emit solely greenhouse gases to obtain permits under the Prevention of Significant Deterioration program,[51] as well as its announced intent to withdraw requirements to reduce greenhouse gases from new and existing coal-fired power plants under the New Source Performance Standard program.[52] More fundamentally, *Oulette* applied to cross-border emissions from a source in one state that caused harm in a different state—while with greenhouse gas emissions, both the emissions and the harm can readily, or even typically, occur on both sides of a state border. Here, plaintiffs may face the same burdens of overlapping legal obligations and conflicting burdens of proof that the defendants faced in the simpler factual setting of *Oulette.*

The issue of cross-border emissions and the proper site for state law tort actions becomes especially pressing when the laws differ dramatically between states. For example, Texas has already legislatively hobbled the ability to bring nuisance actions for emissions of greenhouse gases in Texas.[53] As a result, the choice of state law in this context can determine the outcome of a tort action, but the typical criteria used to select the applicable law for an action—for example, the situs of the harm, the nexus between the activity and the injury, or the citizenship of the defendant[54]—may have little relevance to emissions of greenhouse gases that potentially contribute to climate change damages on a global scale.[55]

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51 80 Fed. Reg. 50,199 (Aug. 19, 2015). EPA withdrew these portions of the rules in respect to Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427 (2014), which rejected EPA's interpretation of the Clean Air Act to impose permit obligations on sources that emitted only greenhouse gases.

52 These rules are also known as the Clean Power Plan. The EPA has issued an Advance Notice of Proposed Rulemaking to withdraw the Clean Power Plan, *see* State Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units, 82 Fed. Reg. 61,507–08 (proposed Dec. 28, 2017), and it is conducting public listening sessions to solicit input on whether and how to revoke the rule, *see* Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 83 Fed. Reg. 4620 (proposed Feb. 1, 2018).

53 TEX. WATER CODE ANN. § 7.257 (West 2017) (creating an affirmative defense against state law nuisance actions arising from emissions of greenhouse gases from facilities that have permits under delegated federal environmental programs for the activities that released the gases).

54 *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (AM. LAW INST. 1971).

55 The federal Clean Air Act allows states to assume primacy for implementing and enforcing their own clean air laws and rules in lieu of the federal program through the process of delegation. The delegation process in turn imposes some degree of uniformity among state programs and laws that must satisfy baseline federal Clean Water Act requirements. If a state lacks authority to issue air permits to

Last, *Oulette*'s rationale for the situs of tort claims may have little applicability if the theory of liability shifts away from the emitting activities themselves. For example, in the Oakland litigation, the trial court refused to dismiss the claims or remand them to state court because it found that the activities underlying the tortious claim centered on:

> [A]n alleged scheme to produce and sell fossil fuels while deceiving the public regarding the dangers of global warming and the benefits of fossil fuels. Plaintiffs do not bring claims against emitters, but rather bring claims against defendants for having put fossil fuels into the flow of international commerce. Importantly, unlike [*American Electric Power Co.*] and *Kivalina*, which sought only to reach domestic conduct, plaintiffs' claims here attack behavior worldwide. While some of the fuel produced by defendants is certainly consumed in the United States (emissions from which are regulated under the Clean Air Act), greenhouse gases emanating from overseas sources are equally guilty (perhaps more so) of causing plaintiffs' harm. Yet those foreign emissions are out of the EPA and Clean Air Act's reach.[56]

Given this shift away from greenhouse gas emissions and federal permitting for activities that cause them, *Oulette's* careful allocation of jurisdiction and responsibility for permitted sources does not facially apply to the production and sale of fossil fuels.[57]

The earlier federal common law tort actions gingerly broached this topic, but failed to tackle it fully. Because *Comer*, *Kivalina*, and *Connecticut v. American Electric Power Co.* each raised state law claims under the district court's diversity or supplemental jurisdiction, the three appellate decisions each touched on preemption grounds in different ways. For example, the Fifth Circuit's panel opinion in *Comer* (now vacated by the en banc order) found that "the clear inapplicability of federal preemption in this case" weighed against using political question doctrine to dismiss the tort action as

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facilities under the federal Clean Air Act (and the EPA has not imposed separate federal requirements under a Federal Implementation Plan), the *Outlette* rationale facially would not apply. Here, the EPA no longer insists that state must prepare their own implementation plans to issue PSD permits to control greenhouse gas emissions. As a result, states can have enormously different approaches to regulating greenhouse gas emissions without the constraints of an overlapping federal air permitting framework.

56 Oakland, Denying Motion to Remand, *supra* note 21, at 7.

57 It should be noted, however, that the federal Clean Air Act also imposes comprehensive and nationally coordinated requirements for the composition and distribution of mobile source fuels and additives. 42 U.S.C. §§ 7545–46 (2018).

a "*de facto* preemption of state law."[58] Similarly, the Ninth Circuit in *Kivalina* noted that, while the U.S. Supreme Court's direction in *American Electric Power Co.* required the Ninth Circuit to dismiss the tribe's federal common law claims as displaced by the Clean Air Act, the district court had already dismissed the state law claims without prejudice so that the plaintiffs could pursue their action in the Alaskan courts.[59] And in *Connecticut v. American Electric Power Co.*, the Second Circuit explicitly declined to rule on state law public nuisance claims because it concluded that federal common law controlled the action.[60]

The new round of state law complaints has already created conflicting decisions by the California district courts on the possibility of preemption. In the *Oakland* litigation, Judge Alsop concluded that the cities' public nuisance claim was "necessarily governed by federal common law," which therefore preempted California common law claims.[61] His rationale, however, focused on aspects of the claim alleging marketing of fuels outside the United States which could still be subject to federal common law despite *Connecticut v. American Electric Power Co.*[62] By contrast, the *San Mateo* court remanded its cases to the California state courts because it concluded that the Clean Air Act's displacement of federal common nuisance claims meant that no federal common law remained to justify removal to federal court.[63]

The Southern District of New York recently added to the discord by dismissing the City of New York's tort action.[64] Judge Keenan's rationale closely paralleled Judge Alsop's prior opinion in the *Oakland* dismissal: the plaintiffs alleged injuries that arose from the worldwide marketing and sales of fuels that consumers used on a global scale. This enormous scope of

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58 Comer v. Murphy Oil Co., 585 F.3d 855, 879 (5th Cir. 2009).

59 Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 866 (9th Cir. 2012) (Pro, J., concurring).

60 Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 392 (2d Cir. 2009).

61 Oakland, Denying Motion to Remand, *supra* note 21, at 3.

62 *Id.* Judge Alsop rested his conclusion on both the need for a uniform standard of decision, "[a] patchwork of fifty different answers to the same fundamental global issue would be unworkable," and the plaintiff's reliance on the defendants' actions in marketing fuel products outside of the United States. *Id.* at 4–5. Interestingly, he did not rule on whether the Clean Air Act's displacement of federal common law left open possible state law actions against solely domestic emitters of greenhouse gases. *Id.* at 6–7.

63 San Mateo, Order Granting Motion to Remand, *supra* note 26, at 2–3 ("Because federal common law does not govern the plaintiffs' claims, it also does not preclude them from asserting the state law claims in these lawsuits. Simply put, these cases should not have been removed to federal court on the basis of federal common law that no longer exists."). Judge Chhabria, however, left open the possibility that federal law might still preempt the nuisance claims. *Id.* at 5 ("It may even be that these local actions are federally preempted.").

64 Opinion and Order, City of New York v. BP P.L.C., No. 18-CV-00182-JFK (S.D.N.Y. July 19, 2018).

international activities raised special concerns of international relations and the need for consistent standards for judgment that demand the application of federal common law rather than state tort law.[65] Once federal common law precluded state tort law, however, the *American Electric Power Co.* decision made clear that the Clean Air Act had already displaced any federal law. Therefore, no action could take proceed, and the court dismissed the action.[66]

This stark division between the federal district courts on such fundamental issues augers an inevitable appellate review and, potentially, conflicts among the Ninth, Second, and Tenth Circuits.[67] The dismissals in the *Oakland* and *New York City* cases create some sense of momentum against the current crop of lawsuits, but several factors may challenge a quick appellate affirmance of those decisions. First, all three district courts in each of the original wave of federal common law climate tort actions dismissed the lawsuits on various grounds. Two of those decisions were initially reversed in the Second and Fifth Circuits, however, and the Ninth Circuit's review was truncated by the U.S. Supreme Court's intervening decision in *American Electric Power Co.* Federal appellate courts here may similarly offer a greater willingness to uphold the federal courts' power to hear climate tort claims, even if they subsequently decline them on prudential, procedural, or substantive grounds. Second, both the *Oakland* and the *New York City* dismissals focus on the federal common law's preemption of state law tort claims without examining whether the federal Clean Air Act's express statutory preemption provisions[68] might require more than a general reliance on federal common law to preempt this entire class of state law claims. While this statutory preemption analysis would be undoubtedly complex and hard to predict,[69] this approach would give proper weight to Congress' setting of the scope of preemption rather than general federal common law principles.[70]

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65 *Id.* ¶¶ 10–13.

66 *Id.* ¶¶ 13–22.

67 This prediction focuses on, obviously, decisions that originate from federal district courts. State court decisions (including appellate reviews) resting on adequate and independent state law grounds may offer limited, if any, grounds for federal judicial review. *See* discussion *infra* note 80.

68 42 U.S.C. § 7604(e) (2018) (citizen suit provision, which simultaneously operates as a savings clause); *id.* § 7416 ("Retention of State Authority").

69 As noted above, the federal appellate courts have already split on the scope of preemption of state law tort claims by the federal Clean Air Act over interstate emissions. *See* discussion *supra* note 49. Notably, both the *Oakland* and the *New York City* dismissals focused on the plaintiffs' attempt to shift the alleged wrongful action from combustion of fossil fuels generally to the marketing and false representations related to sales of fossil fuels. The Clean Air Act, however, imposes extensive requirements on the composition and distribution of fuels, and the fuels program of the Clean Air Act has one of the statute's strongest federal preemptive effects. 42 U.S.C. §§ 7521–54 (2018).

70 While both the *Oakland* and *New York City* dismissals emphasized the primary roles of the legislative and executive branches when they declined to craft a new federal common law tort cause

II. NAVIGATING THE CONFLICT WITH JUDICIAL FEDERALISM PRINCIPLES

If the traditional tools of preemption or displacement will not necessarily offer a viable means to cabin the scope of state law tort actions for climate liability, how can the courts navigate a potential morass of overlapping, burdensome, and conflicting state lawsuits? One possible strategy might lie in the foundational principles of judicial federalism.

Federalism concerns have not suffered from a lack of attention by legal scholars, and judicial federalism concepts in particular have spurred the development of a rich and complex body of scholarship and analysis.[71] Judicial federalism explores how the core principles underlying federalism affect the allocation of powers and responsibilities between federal and state judicial systems and administration of justice. To some extent, it necessarily overlaps with the larger body of law focused on how state statutes and common law coordinate with federal laws. But by focusing on judicial powers and systems, it weighs those same concerns within the narrow sphere of the scope and frailties of judicial power itself.

The current climate change policy debate has largely not focused on the judicial aspects of federalism. Much of prior federalism legal scholarship has centered on the proper allocation of authority between Congress and states on the formulation of legislative priorities. For example, numerous scholars have explored how aggressive state legislative initiatives (such as California's carbon trading and greenhouse gas emission regulations) might conflict with powers and responsibilities vested solely or primarily in Congress.[72] To the extent that judicial federalism concerns in climate liability tort actions have surfaced, they have largely helped analyze how federal

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of action, each opinion relied heavily on the U.S. Supreme Court's recent opinion in Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018). That decision, however, stressed the importance of deferring to the legislative branch when interpreting statutory language that pertains to international relations and the conduct of the nation's foreign affairs. *Id.* at 1403. These concerns led the Court to interpret the Alien Tort Claims Act to not support claims against foreign corporate entities. *Id.* at 1398–1402. While these concerns will inform the court's construction of the Clean Air Act preemption provision, the *Jesner* rationale should not be read to broadly foreclose the development of federal common law causes of action outside of the context of statutory interpretation.

71 *See, e.g.*, Thomas Baker, *A Catalogue of Judicial Federalism in the United States*, 46 S.C. L. REV. 835 (1995) (and sources listed therein).

72 *See, e.g.*, Cary Coglianese & Shana Starobin, *The Legal Risk of Regulating Climate Change at the Subnational Level*, REGULATORY REV. (Sept. 18, 2017), https://www.theregreview.org/2017/09/18/coglianese-starobin-legal-risks-climate-change-subnational/.

statutes and regulations can constrain or preempt the ability of state courts and judges to hear certain tort claims alleging climate damages.[73]

A. Judicial Federalism Foundations and Constitutional Mechanisms

In the judicial arena, federalism principles provided the justifications for creating dual federal and state judicial systems and allocating power between them. The differences between the systems include, for example, the inherently limited subject matter jurisdiction of the federal courts as compared with the typical general jurisdiction of state courts, the capacity for federal courts to exercise personal jurisdiction over individuals outside the boundaries of a particular state (if Congress has statutorily granted the federal court that power), and the ability of federal court actions to invoke the power of the Supremacy Clause to override conflicting state court decisions based on federal constitutional or statutory precepts.[74]

The creation of these overlapping judicial systems reflects the deep policy principles that underlie U.S. federalism. While maintaining two overlapping and (arguably) duplicative judicial systems appears puzzling at first glance, this arrangement serves important purposes. For example, it protects non-resident litigants from favoritism towards local claimants by allowing removal of certain claims to federal court and the ability to seek a federal forum even for claims rooted in state law under the court's diversity jurisdiction. Similarly, the availability of a federal court system presumably helps assure greater uniformity of decisions through the availability of federal judicial review. It also protects federal authority and avoids fragmentation and disruption of national standards and policies through federal judicial implementation of preemption and displacement principles.

At its most fundamental level, the dual court systems reflect a substantive democratic choice about the suitability of particular courts or fora for certain categories of claims, including the availability of federal citizen suit actions under environmental programs delegated to state governments for administration, the investment of exclusive jurisdiction for certain claims in federal courts, and the statutory force and uniformity behind the federal judiciary's civil and criminal procedural rules. Notably, these principles of judicial federalism should allow the federal and state judicial systems to

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73 *See, e.g.*, Alexandra Klass, *State Innovation and Preemption: Lessons from State Climate Change Efforts*, 41 LOY. L.A. L. REV. 1653, 1698–99 (2008); Sean Mullen, *The Continuing Vitality of the Climate Change Nuisance Suit*, 63 RUTGERS L. REV. 697, 700 n.20 (2011).

74 *See* Hester, *supra* note 39, at 55–78 (for a deeper discussion of these distinctions).

operate as complements to each other's authority rather than struggle in a zero-sum conflict over their respective jurisdictions and powers.[75]

To implement these goals, the U.S. Constitution uses a combination of express textual commitments in Article III and other constitutional provisions as well as structural allocations of power between the federal and state governments. These features have received deep and detailed judicial and scholarly analysis in other settings, but some of them bear special mention in the context of state law climate liability tort litigation. The Supremacy Clause, for example, obviously plays a central role in assuring that the federal judiciary retains the ultimate authority to render dispositive opinions on certain questions reserved to it by statute or constitutional allocation. On a more prosaic level, the Full Faith and Credit Clause protects the ability of U.S. citizens to enforce the judgments of one state's courts in the judicial forum of another state or the federal judicial system, including climate liability judgments rendered in one state that are enforced in another state.[76] The U.S. Constitution also helps harmonize the overlapping federal and state judicial systems through providing for original jurisdiction for the U.S. Supreme Court to review judgments involving state parties[77] or to review final state judgments involving federal issues.[78] Last, federal principles of statutory interpretation help coordinate activity between the two judicial systems by bending statutory interpretation to promote certain systematic values, such as the federalism clear statement principle and the extraterritoriality canon.[79]

The principles of judicial federalism are also woven into the federal judicial fabric through Article III's investiture of judicial power itself. For example, Article III's sculpting of federal judicial power through standing doctrine reflects the limited jurisdictional powers of the federal courts versus

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75 These comments, of course, apply primarily to federal courts invested (and limited) with judicial power under Article III. Other courts and decisional bodies, such as Article I courts, administrative law judges and tribunals, and arbitral bodies, do not face these constraints and may have opportunities to operate in different ways.

76 Beyond the Full Faith and Credit clause's mandate in U.S. CONST. art. IV, § 1, section 1738 of the Judiciary Act requires federal courts to give the same full faith and credit to a state court's ruling that the court's home state would grant to it. *See* 28 U.S.C.A. § 1738 (West 2017). Notably, federal law alone dictates the *res judicata* effect of a federal court's ruling. RESTATEMENT (SECOND) OF JUDGMENTS § 87 (AM. LAW INST. 1982).

77 U.S. CONST. art. III, § 2, cl. 2 (granting original jurisdiction to U.S. Supreme Court for matters "in which a State shall be party . . . .").

78 While the U.S. Constitution does not explicitly provide for Supreme Court review of state court decision, the Judiciary Act of 1789 permits review of state court judgments. The Supreme Court vigorously upheld this authority in Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816). Similarly, the federal courts typically cannot review state court rulings regarding state law (unless they pose some federal issue). *See* Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 625–26 (1874).

79 Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 115–16 (2013) (extraterritoriality canon); Gregory v. Ashcroft, 501 U.S. 452, 461–64 (1991) (federalism clear statement principle).

the broader mandates of state general courts, and the scope of other doctrines that constrain federal judicial review—such as the political question doctrine—reinforce the complementary role of the federal judiciary in relation to the state court systems.

These aspects of judicial federalism have already begun to appear—and shape—state law climate tort actions. They have developed both on the vertical plane (as allocations of authority between federal and state judiciaries) and the horizontal plane (as mediations between competing judicial actions in differing state judiciaries).

1. Vertical allocations of judicial authority (federal-state)

The role of judicial federalism appears most starkly in its distribution of powers between the federal and state judiciaries. The most preeminent example, of course, is the availability of federal judicial review for state law cases brought either under the court's diversity jurisdiction or its supplemental jurisdiction on related federal law claims. In these circumstances, the federal judiciary can offer a separate forum to resolve issues under state laws that directly pertain to the imposition of liability for climate damages under state law tort actions.[80] In doing so, the federal court would provide a venue to resolve foundational liability issues while allowing claimants to resort to the federal courts' procedural rules, inherent jurisdictional authority for enforcement and remedies, and purportedly more neutral setting. Notably, the City of New York filed its state law climate tort action directly in federal district court under its diversity jurisdiction.[81]

Similar dynamics drive the allocation of authority under standing doctrines. As noted previously, the federal courts rely on narrower jurisdictional limits for their ability to grant standing to certain claimants. These constraints arise from the fundamental investiture of judicial power in those courts under Article III. State courts, by contrast, enjoy the capacity to hear broader classes of claimants than their respective state constitutions or statutes might allow.[82] As a result, judicial federalism principles in this

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80 *See* 28 U.S.C.A. § 1652 (West 2017). Of course, the scope of federal judicial review of state court decisions remains constrained to state rulings on questions of federal law. To the extent that a state court rules on a climate tort lawsuit solely on state law grounds (or on federal and state legal claims that involve an adequate and independent state ground), the federal courts generally should not have jurisdiction to review the state court's ruling absent both invocation of federal constitutional or other federal legal concerns, and the unavailability of state review of that federal claim. *See Murdock*, 87 U.S. (20 Wall.) at 593.

81 New York City Complaint, *supra* note 2.

82 For example, the constitutions and statutes of Mississippi and Hawaii allow broader bases for standing in their respective state courts. The plaintiffs explicitly relied on Mississippi's broader notions of standing to support their claims in the *Comer* lawsuit. Hester, *supra* note 39, at 61–62.

context will seek to allocate greater power to state courts to hear claims that fall outside traditional Article III standing doctrine, including potential climate tort litigants who may not offer the same concrete injury-in-fact or facially redressable claims that federal judicial prerequisites would demand.

Other doctrines driven by judicial federalism to distribute powers between the federal and state judiciaries could play potent roles in dictating which court systems, if any, can hear climate tort liability claims. Most notably, federal political question doctrines have already played a pivotal role in limiting initial judicial hearings on climate tort actions brought in federal courts under federal common law, and they may play a similar role in state law claims ushered under federal diversity or supplemental jurisdiction. In addition, abstention doctrines—including *Pullman*,[83] *Burford*,[84] and *Colorado River*[85]—could serve to insulate state court determinations from federal judicial review and effectively allocate the power to resolve climate tort liability claims to state judiciaries in lieu of federal courts.[86]

Beyond these jurisdictional prerequisites, judicial federalism concepts also offer powerful constraints on the federal court's consideration of the merits of climate liability tort claims under state law. In particular, the *Erie* doctrine dictates that federal courts typically adhere to state substantive laws to resolve claims while relying on federal procedural law to hear those claims.[87] As a result, it will require the federal courts to choose which aspects of a state's tort laws constitute substantive or procedural legal obligations in a climate liability action.[88] Given the enormous liability stakes raised by some of these claims and the potentially outcome-determinative effect of this categorization, the judicial federalism aspects of certain routine aspects of trial management—such as the admissibility of expert testimony and the application of state privilege laws—may assume dramatically higher profiles.

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83 R.R. Comm'n of Tex. v. Pullman, 312 U.S. 496 (1941) (federal courts can abstain from hearing federal constitutional claims to give state courts an opportunity to address those issues).

84 Burford v. Sun Oil Co., 319 U.S. 315 (1943) (federal court can abstain from taking case under its diversity jurisdiction when state court would have greater expertise and issue involves important state policies or values).

85 Col. River Water Conservation Dist. v. United States, 424 U.S. 800 (1976) (federal court has limited discretion to dismiss action where concurrent jurisdiction with state courts threatens duplicative or wasteful litigation).

86 Federal courts may also enjoy dominant or exclusive jurisdiction in areas where state law climate tort claims impinge into the federal government's foreign affairs authority under the U.S. Constitution. In addition, the Judiciary Act precludes federal courts from enjoining state court proceedings, 28 U.S.C.A. § 2283 (West 2017), but this bar is riddled with numerous exceptions. State judiciaries also cannot enjoin federal court proceedings or bar individuals from filing federal claims. Gen. Atomic Co. v. Felter, 434 U.S. 12 (1977); Donovan v. Dallas, 377 U.S. 408 (1964).

87 Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

88 Hester, *supra* note 39, at 73.

Last, the federal courts may have to navigate judicial federalism constraints on their ability to provide the relief requested in climate liability tort actions. For example, if a claimant requests injunctive relief, the federal courts may face limits on their ability to weigh the equities related to the injunction if a federal statute constrains the court's ability to look outside Congressionally determined values.[89] Because these constraints arise from the foundational nature of the federal courts' powers, those courts may not be able to grant injunctive relief even if the underlying claims rest on state laws and the state's courts could otherwise issue the injunction.

2. Horizontal allocations of judicial authority (state-state)

Judicial federalism principles also steer the allocation of powers between the courts of differing states. In particular, beyond dividing power between the federal and state courts, these principles also require that the respective state courts respect each other's decisions and assure the integrity of their separate operations within federal constitutional constraints. For example, while a state court cannot display favoritism to claimants based on their residence or citizenship, judicial federalism limitations nonetheless allow a state court to entertain claims brought by a sovereign of that state that its private citizens or nonresidents could not bring (for example, by recognizing the legislature's waiver of statute of limitations periods for claims brought by the state).[90]

Next, the horizontal allocation of judicial powers under federalism constraints also arises starkly with extraterritorial claims. In particular, a state judicial forum may lack *in personam* jurisdiction over non-resident defendants that a federal court could nonetheless exercise.[91] This constraint may prove especially critical with climate tort liability claims that seek recovery from defendants who have emitted from locations literally throughout the world. Beyond the simple exercise of jurisdictional authority, these judicial federalism principles also inform how state judiciaries interpret state tort laws

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89 Winter v. NRDC, Inc., 555 U.S. 7 (2008); Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982).

90 The U.S. Supreme Court has long acknowledged the authority of state legislatures to modify the conditions for statutes of limitations that might apply to claims brought against their sovereign state governments. Beers v. Arkansas, 61 U.S. (20 How.) 527, 528 (1857); Bronson v. Kinzie, 42 U.S. (1 How.) 311 (1843).

91 A federal district typically can exercise jurisdiction to the full extent allowed by the long-arm jurisdictional statute of the state where the federal court sits. If the state's law does not extend personal jurisdiction, the federal court can nonetheless exercise jurisdiction when the accompanying federal statute authorizes it or the case involves an alien party otherwise outside the state court's jurisdiction. Federal district courts can also reach parties outside the state who live within the federal judicial district and within 100 miles of the court. FED. R. CIV. P. 4(k)(1)(B)–(2).

or statutes to apply to extraterritorial activities. Like the federal courts, many state court systems will interpret a state statute to apply outside the borders of that state only upon a clearly expressed desire by the state legislature to grant its law an exterritorial reach.[92]

Last, if one state judicial system's judgment to impose climate tort liability must be enforced in another state that does not recognize the legal basis for such claims, horizontal constraints will also quickly surface. For example, Texas has enacted legislation that specifically limits the imposition of tort liability for damages allegedly caused by the emission of greenhouse gases from activities otherwise regulated by federal laws or permits.[93] Defendants may wish to resist the collection or enforcement of such a judgment by alleging that the Texas statute establishes a public policy against the enforcement of such foreign judgments. In addition, many states have passed tort reform legislation that limits the ability of claimants to recover punitive damages, impose joint and several liability, or pursue claims for injuries that occurred prior to a statute of repose (even if not discovered until later).[94] It remains unclear whether these tort reform statutes will have the unintended effect of foreclosing climate liability tort claims on a sweeping, or even categorical, basis.

B. Potential Roles for Judicial Federalism Principles in Climate Tort Liability Litigation

So how can judicial federalism help direct the administration and management of state law climate liability tort actions, in both federal and state court systems? On the horizontal conflict level, judicial federalism principles could urge a broader interpretation of the *Oulette* and *American Electric Power Co.* precedents to allow the pursuit of state law climate tort claims in states where the injury occurred (rather than the place of the emission), because the greenhouse gases that contributed to the harms could be emitted from virtually any location. This approach would respect both the

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92 Similar concerns may drive a state judiciary's willingness to apply *forum non conveniens* doctrines to climate liability tort claims rooted in state laws when the causative actions, testifying witnesses and parties, and responsive documents all lie within a different state or nation.

93 *See* discussion *supra* note 53.

94 ANDREW C. COOK, THE FEDERALIST SOC'Y, TORT REFORM UPDATE: RECENTLY ENACTED LEGISLATIVE REFORMS AND STATE COURT CHALLENGES (2012), https://fedsoc-cms-public.s3.amazonaws.com/update/pdf/h51Xzdd6qKP4hY5Jw6e2hSAL4ZyWWiUcT5bHD05i.pdf (summarizing recent state tort law reform initiatives); CONG. BUDGET OFFICE, THE EFFECTS OF TORT REFORM: EVIDENCE FROM THE STATES 3–8 (2004), https://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/55xx/doc5549/report.pdf. *Cf.* CTS Corp. v. Waldburger, 134 S. Ct. 2175 (2014) (CERCLA fails to preempt state statutes of repose for hazardous substances exposure claims).

Congressional allocation of power and permit authority within the general framework of the federal Clean Air Act, while upholding the powers of state court judiciaries to resolve these claims under their respective laws and procedures.

On the vertical plane, the resolution of conflicts between federal and state judicial powers and competence will also depend heavily on the specific facts and parties underlying the climate tort action. Of course, federal courts routinely demonstrate the capacity to handle complex environmental claims brought by large numbers of plaintiffs against numerous defendants, and they have developed innovative and effective tactics to administer complex trials and contested proceedings. In the vast number of tort actions following the Deepwater Horizon incident,[95] for example, the federal trial court used novel scheduling and discovery tactics, bifurcated and staged trials for liability and allocations, and bundled pleading and discovery processes to expeditiously resolve tort claims that otherwise might have lasted for decades.[96] While climate liability tort actions differ in critical and fundamental ways from the contamination tort actions brought after the Deepwater Horizon spill,[97] they nonetheless offer opportunities for similarly creative docket management techniques and dispositive motion practice.

If states choose to coordinate their approaches to climate tort claims, judicial federalism principles could also affect their strategies. If state plaintiffs entered into a formal arrangement to share litigation costs or prospectively allocate damage awards, this agreement arguably might raise questions about the limits imposed by the Compacts Clause of the U.S Constitution.[98] Attempts to use class actions in conjunction with aggressive *res judicata* and collateral estoppel claims may also face federal or state

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95 The blowout of the Macondo deepwater well in the Gulf of Mexico in 2010 led to the largest marine oil spill in U.S. history. *See* NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING (2011), https://www.gpo.gov/fdsys/pkg/GPO-OILCOMMISSION/pdf/GPO-OILCOMMISSION.pdf (final report of national commission's investigation into the causes of the Deepwater Horizon disaster).

96 John Cruden, Steve O'Rourke & Sarah Himmelhoch, *The Deepwater Horizon Oil Spill Litigation: Proof of Concept for the Manual for Complex Litigation and the 2015 Amendments to the Federal Rules of Civil Procedure*, 6 MICH. J. ENVTL. & ADMIN. L. 65 (2016).

97 For example, the California and New York state law tort actions purportedly do not pose a clearly federal question of law and basis for jurisdiction (i.e., admiralty jurisdiction), cannot point to a solitary identified incident that caused the damages, lack a clearly delineated and manageable group of defendants, and lack any dispute over the nexus between the actions causing the release and the damages suffered by the plaintiffs.

98 The Compacts Clause of the U.S. Constitution bars states entering into "any Agreement or Compact with any other State" without the consent of Congress. U.S. CONST. art. I, § 10, cl. 3. The federal courts have struck down agreements as unapproved compacts predominantly when states use them to impermissibility encroach of the powers of the federal government or non-compact states. U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452 (1978).

judicial reluctance to allow the conscription of judicial mechanisms for state policy goals and monetary recoveries.

III. POSSIBLE LONG-TERM TRAJECTORIES FOR JUDICIAL FEDERALISM AND CLIMATE TORT CLAIMS

Judicial federalism has already begun to shape the state law claims brought in the newest wave of litigation. The imposition of exclusive federal jurisdiction for bankruptcy claims, for example, led to the dismissal of Peabody Coal from the California tort actions because the company had previously discharged general contingent claims as part of its recent bankruptcy action.[99] Claims against U.S. governmental entities or agencies, or foreign sovereign entities or their corporate forms, will also likely run aground against constraints on state judiciaries to exercise jurisdiction over such parties.[100]

Beyond such sparring over the respective jurisdictional powers of state and federal courts, however, the ultimate effect of judicial federalism principles may lie in their support for legislative or regulatory action to clarify the power of courts to resolve climate tort liability claims. At least one state, as noted earlier, has already acted unilaterally to foreclose such tort actions explicitly, and the prior tort reform legislation passed by other states may unintentionally serve to accomplish similar outcomes.[101] Ultimately, if state law climate tort actions create conflicting obligations and risks of catastrophic liability for U.S. industry, Congress may pursue federal legislation to restrict the availability of tort litigation as it has done for other classes of claims in the past (such as the Class Action Fairness Act of 2017).[102]

In sum, the shift of climate tort liability litigation to state courts goes beyond a simple change in tactics. It reflects a fundamental change in the posture, prospects, and feasibility of these lawsuits. While the principles of judicial federalism will help to clarify the allocation of powers and responsibilities between the federal and state court systems when faced with overlapping or conflict state law tort claims, the prospect of conflicting and incommensurate verdicts and liabilities will increase pressures for either regulatory or legislative actions on both the federal and state levels to provide

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99 *See, e.g.*, In re Peabody Energy Corp., No. 16-42529-399, 2017 Bankr. LEXIS 3691 (Bankr. E.D. Mo. Oct. 24, 2017) (dismissing climate tort claims as subject to bankruptcy bar raised by company's prior Chapter 11 proceeding).

100 *See* discussion *supra* note 19 (motions to implead Statoil as a third-party defendant after the plaintiffs had voluntarily dismissed it because of concerns over sovereign immunity).

101 *See* discussion *supra* note 53; *see also* Hester, *supra* note 39, at 74.

102 The Class Action Fairness Act of 2005, 28 U.S.C.A. §§ 1332(d), 1443, 1711–15 (West 2017).

a more unified and consistent answer to climate liability claims. These actions should aim to provide greater democratic accountability, economic predictability, and judicial consistency in this emerging field of liability claims.